

LITIGATION UPDATE (as of 9/17/07): ENDANGERED SPECIES ACT/DELTA WATER OPERATIONS

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WANGER I (DELTA SMELT)

On August 31, 2007, U.S. District Court Judge Wanger ruled from the bench in NRDC v. Kempthorne, remanding (but not vacating) the 2005 OCAP delta smelt biological opinion to USFWS to prepare a new opinion (expected in late 2008), and issuing a prohibitory injunction against USBR and DWR to operate the SWP/CVP in the interim not inconsistent with a suite of actions the judge ordered based upon proposals submitted by the parties. Those actions include enhanced surveys and monitoring, operational constraints from late December 2007 through June 2008, and prohibitions on temporary barrier installation.

The judge gave the parties 50 days, until October 22nd, to review the official transcripts and prepare a draft final order, including findings of fact and conclusions of law. The judge asked for a joint submission, but advised that he would accept competing proposals and resolve the differences.

The judge reserved to DWR and USBR “the right on reasonable notice to deviate from the prescriptive remedies, if necessary to protect public health, safety and the human environment.” During the hearing, the judge had indicated that public health, safety and human environment concerns were not necessarily limited to the maintenance of emergency water supplies for schools, hospitals or fire departments, but could include, depending upon the circumstances, significant effects related to agricultural land fallowing and/or subsidence from increased groundwater pumping necessitated by the absence of project water.

WANGER II (SALMON AND STEELHEAD)

A hearing is scheduled for October 3, 2007, in Judge Wanger’s court on the merits of a companion lawsuit—PCFFA v. Gutierrez-- challenging the 2004 OCAP salmon and steelhead biological opinion issued by the National Marine Fisheries Service. Plaintiffs allege similar types of deficiencies with this biological opinion, with particular emphasis on alleged adverse impacts to species and habitat caused by changes to cold-water temperature management (i.e., elimination of Shasta carryover storage requirement and movement of temperature compliance point on the Sacramento River).

The judge had ruled earlier in this case that, contrary to plaintiff’s allegations, the OCAP was not a “final agency action” by USBR, triggering the need to prepare an environmental impact statement under NEPA.

WATERSHED ENFORCERS I

On May 9, 2007, DWR filed an amended notice of appeal in Watershed Enforcers v. DWR, a case brought in Alameda County Superior Court challenging DWR's incidental take authority under the CESA for operation of the SWP pumping facilities.

The appeal in the 1st District Court of Appeal (San Francisco) stays an April 18, 2007, writ of mandate ordering DWR to cease and desist from further operation of the SWP pumping facilities within 60 days until and unless it obtains appropriate CESA incidental take authorization for spring and winter run Chinook salmon and Delta smelt from the Department of Fish and Game.

On July 6, 2007, the appeals court issued an order consolidating the various parties' appeals, and requiring appellants' opening briefs to be filed within 30 days of the filing of the record on appeal. That record, to date, has apparently not yet been filed by the trial court.